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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979 No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

BRIEF AMICI CURIAE FOR MID-ATLANTIC LEGAL FOUNDATION AND DONALD POWERS IN SUPPORT OF THE APPELLANT

On Appeal from the Court of Appeals of the State of New York.

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INTEREST OF THE AMICI CURIAE

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation and Donald Powers hereby move the Court for leave to file the attached brief as *amici curiae*. Consent was secured from counsel for both parties. Copies of these letters have been filed with the Court.

Mid-Atlantic Legal Foundation is a nonprofit, tax exempt corporation organized and existing under the Laws of Pennsylvania and active in a six-state region which includes New York. It was organized for the purpose of engaging in litigation in matters affecting the broad public interest. Mid-Atlantic Legal Foundation has already filed an *amici* brief with other parties in the companion case to this one, *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York, Supreme Court of the United States, October Term, 1979, No. 79-134.*

This *amici* brief is also presented on behalf of a recipient of Central Hudson's electricity services who would like to continue to hear about the further utilization of electricity in his residence.

Mr. Donald Powers is a retired person who receives and pays appellant's utility bills at his residence in Cold Stream, New York.

Amicus, Mid-Atlantic Legal Foundation, files this brief because of its belief that our predominantly free enterprise economic system is an essential foundation of our republic and that the Court's recognition of the values of the free flow of commercial speech in that free enterprise system should continue to be carefully molded in the interest of all the public. *Amicus,* Donald Powers, files this brief because as a user of Central Hudson's services, he wishes to know the additional services Central Hudson may have to offer in competition with others, all economic alternatives available to him as he attempts to cope with his fixed income and the environmental and inflation ramifications of those alternatives.

SUMMARY OF THE ARGUMENT

The Court's decisions on commercial free speech have carefully defined a high level of state interest and serious dangers to the public from the speech at issue in order to justify abridgement of First and Fourteenth Amendments. In those cases striking down commercial speech prohibitions, it has carefully set forth those types of dangers.

The New York Public Service Commission ("PSC") has not shown a compelling or other sufficiently high level of state interest to justify its total content-oriented ban. Claimed cost justifications are either plainly irrelevant or marginal. Environmental considerations are likewise marginal. As important as energy conservation is as a national objective, the banner of the "energy crisis" is not enough to define a sufficient state interest in the context of the First Amendment rights abridged, because the Order is a complete ban which suppresses competition, because it removes from Central Hudson's customers the right to make their own economic decisions in respect of competing petroleum-using alternatives and, lastly, because the impact of the Order on energy conservation will, in fact, be minimal.

The Court of Appeals erred in its application of First Amendment law by failing to properly consider the competitive marketplace in which the proposed advertising would speak, by misapplying a decision involving "time, place or manner" restriction to the blanket ban at issue here, and by giving summary treatment to the issue of the level of state interest by taking judicial notice of the "energy crisis" without properly evaluating its meaning and ramifications as applied to the Order.

ARGUMENT

I. THE ORDER OF THE PUBLIC SERVICE COMMISSION UNJUSTIFIABLY ABRIDGES APPELLANT'S CONSTITUTIONAL RIGHT TO ENGAGE IN TRUTHFUL PROMOTIONAL ADVERTISING AND THE CONSTITUTIONAL RIGHT OF THE PUBLIC TO RECEIVE IT.

A. Appellant ("Central Hudson") wishes to promote by advertising the use of its electricity for which it has both summer-on-peak and winter-off-peak capacity. The parties apparently agree that such advertising in the foreseeable future would be limited to promoting electricity resulting from the installation of heat pumps. The PSC has ordered Central Hudson and all New York electric utilities not to engage in any such advertising and to remain silent. "[T]his order works a direct curtailment of expressional activity: an entire category of speech is prohibited . . ." In the matter of *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 47 N.Y. 2d 94, 107, 417 N.Y.S. 2d 30, 37 (1979). (App. 1a, 10a).[1]

This Court's recognition of rights to First Amendment protection for commercial speech has been articulated only recently. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Associates, Inc., v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar*

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1. Appendix references (App.) are to that of Appellant's Jurisdictional Statement.

Association, 436 U.S. 447 (1978), (collectively, "the 1970s cases").[2]

Although recently articulated, First Amendment protection is not the grant of a new right. Rather, the 1970s cases are current recognition of rights existing since, and grounded in, the Constitution itself. (Compare *Valentine, Chrestensen*, 316 U.S. 52 (1942) and *Bigelow v. Virginia*, 421 O.S. at 819, 820 n. 6). Those rights are "among the fundamental and personal rights and "liberties" protected by the [First and] Fourteenth Amendment[s] from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

The principles and interests underlying the commercial speech First Amendment rights of speaker, recipient, and society were clearly set forth in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 762-765:

> [W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. (762)
>
> * * *
>
> As to the particular consumer's interest in the free flow of commercial information, that interest may

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2. Apparently the Parties and courts below have treated appellant's proposed promotional advertising as strictly commercial speech, akin to the offer of sale at a price in *Virginia Pharmacy, supra.* Certainly, if the ads included advice on conservation, as amici are confident they would, the "speech" would include non-commercial information akin to that of the abortion availability ads of *Bigelow v. Virginia, supra.* Further, even purely promotional language will necessarily be part of the current public debate in the economic, social and political arenas involving the interrelated issues of energy uses and sources, inflation, environment and nuclear power. They therefore will be of inherent public interest and labelling and treatment of them as "commercial" may be inappropriate, particularly if a significantly lesser First Amendment protection might otherwise be accorded them.

> be as keen, if not keener by far, than his interest in the day's most urgent political debate. (763)
>
> * * *
>
> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. (764)
>
> * * *
>
> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. (765)

The PSC's order goes to the content of the proposed advertising itself and is a complete prohibition.[3] The First Amendment requires exacting scrutiny of state-imposed restrictions. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *Bigelow v. Virginia*, 421 U.S. at 820; *New York Times Co. v. Sullivan*, 376 U.S. at 266. Where the prohibition is directed at speech itself. "the State may prevail only

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3. It should be noted that the effect of this particular ban goes beyond the promotional advertising, *per se*. Unlike the pharmacists in *Virginia Board* or the attorneys in *Bates* or *Ohralik*, for examples, Central Hudson is not free to engage in public comment, whether in the form of institutional ads or otherwise, which would be critical of the PSC's position as a political matter or which would be designed to gain public support for permission to engage in promotional advertising. The comment itself might well promote heat pumps and electricity.

upon a showing of a subordinating interest which is compelling," *First National Bank of Boston*, 435 U.S. at 786; *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); "and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). It is not the citizen who must justify his speech, *First National Bank of Boston*, 435 U.S. at 784, but the state which must justify its abridgement by a showing of a compelling interest.

To sustain that burden of justification the state must show that the protected "speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State may seek to prevent . . ." And the danger apprehended must be sufficiently "imminent that it may befall before there is opportunity for full discussion." *Whitney v. California*. 247 U.S. 357, 373, 377 (1927). That the standards of *Whitney* apply to Commercial speech cases which result from content-oriented regulations was recognized in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 97.

The Court has observed in *Ohralik v. Ohio State Bar Assn.* that in recognizing that commercial speech is to be accorded First Amendment status, it has been careful to note the "common-sense" differences between commercial and noncommercial speech and that it had "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." (436 U.S. at 455, 456).

The "limited measure" and "subordinate position" remain to be precisely defined. At present, they indicate only the generality of some discount from the starting point standards of *Bellotti, Bates v. Little Rock, Elrod v. Burns* and *Whitney v. California.*

And, of course, throughout the development of the 1970s cases, this Court has explicitly recognized that in

proper circumstances such speech, as all speech, may be regulated. The decisions have been careful to point to, however, if not completely define, the kinds of advertising dangers which justify regulation. They are: "time, place or manner"[4] (*Virginia Board, Carey, Bates v. State Bar of Arizona*); false, misleading, deceptive or fraudulent (*Bigelow, Virginia Board, Willingboro, Carey, Bates v. State Bar of Arizona*);[4] invasion of privacy or speech to a captive audience (*Bigelow*); illegal product or service or promotion of an illegal scheme (*Bigelow, Virginia Board, Carey, Bates v. State Bar of Arizona*).

No such dangers exist in the case at bar. Central Hudson merely wishes to engage in truthful promotional advertising in a competitive market so that the New York public in that market can make informed economic decisions they have the constitutional right to make.

B. The PSC has not justified its abridgement. The Court of Appeals has decided that the PSC has the power to issue its order. But that power, given by the legislature to a state agency, does not decide the question whether the state has a compelling interest sufficient to strike down a constitutional right by a total speech ban.

For the purposes of First Amendment analysis, the PSC's order is premised on an important inconsistency, contains an arbitrary selection of priorities and is founded on economic and operating considerations which are marginal in the aggregate.

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4. *Ohralik* itself involved misleading communications against a background of serious professional misconduct and upheld a "time, place, or manner" regulation. After *Ohralik*, Ohio lawyers are free to advertise but not to engage in face to face solicitation. Nor are the additional forms of regulated communications mentioned in *Ohralik*, 436 U.S. at 456 anything new. Securities laws are disclosure statutes which proscribe misleading communications. The exchange of price and product information fosters illegality, *i.e.*, price fixing. Employer threats of retaliation are commercially analogous to threats of physical harm.

1. The original 1973 ban on promotional advertising was issued within weeks of the Arab oil embargo which created a dramatic and immediate oil shortage. New York utilities did not have, and could not get at any price, sufficient oil to fulfill their current demand. In the language of that order, the situation was an "impending emergency [which] because of the immediacy of the problem . . . [required] direct control necessary to avert a disaster." (App. 26a). That is First Amendment abridgement language which may describe a sufficient State interest in the promotional advertising ban which resulted.

The 1977 order at issue here does not even pretend to define such an emergency. Rather, it points to a long-term problem of the nation's over-dependence on foreign oil and concludes lamely that the PSC thinks "it is reasonable to believe [that its ban] will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales." (App. 37a). No measurement of the quantum of that reduction is given.

The PSC's own language is tantamount to an admission by it that no impending danger or emergency exists sufficient to justify a total speech repression.

2. After acknowledging the many infirmities underlying its order, the PSC concluded "conservation of energy remains our highest priority." (App. 37a). The PSC does not tell us why it subordinated such interrelated issues as economy, efficiency, inflation. stagflation and environmental concerns or why it apparently saw fit not to balance short-term conservation against those other serious national problems or with long-range programs for conservation and environmental control before imposing a complete promotional advertising ban. Such failures reflect arbitrary action by the PSC violating §5-2 of its own enabling act. *N.Y. Public Service & Law* (McKinney) (Supp. 1978).

3. The PSC's claimed interest appears to be based on three factors none of which either singly or in the aggregate withstand First Amendment analysis.

a. Costs. The claims are that (1) rates do not cover the marginal costs of new capacity, and (2) electrical costs are spiraling in substantial part due to pressures for increased capacity. Both claims are pure diversions.

(1) Marginal costing seeks to assign to users of new capacity the incremental cost directly attributable to that new capacity. Central Hudson seeks to promote existing excess and idle capacity, both summer-on-peak and winter-off-peak.

(2) The upward pressure on electrical costs resulting from increase demand may be expected to continue despite the ban. While Central Hudson sits silent, builders of both industrial and residential buildings and manufacturers of air-conditioning equipment will be pushing their products and the public itself may be expected to continue to desire them without regard to winter-off-peak heating.

The fact is that the proposed promotion would work cost and inflation benefits which the PSC acknowledged but cast aide: "development of off-peak load would likely result in a lowering of the unit cost of electricity, due to greater utilization of existing plant, with a resulting downward pressure on, or at least a stabilization of, present rates." (App. 36a).

b. Environment. The claim of the PSC majority was that "[i]ncreased off-peak generation, however, . . . creates incremental air pollution and thermal discharges to waterways." (App. 37a).

Commissioner Kahn, however, had a different view of the environmental effects when he considered the alternative, heating oil: "I must point out . . . that the three for one comparison grossly exaggerates . . . because it fails to take into account . . . the lesser injury to the environment

from combustion of oil in electricity generation than, alternatively, in thousands of separate furnances . . ." (App. 50a).[5]

Mr. Kahn also pointed out that the three for one comparison failed to take into account the energy cost of home fuel oil delivery which also has the environmental effect of further eroding air quality because of increased automotive emissions.

As is the case with much of the record, the environmental considerations lack precise measurement.[6] Although they probably favor promotion of electrical heating, it is clear for First Amendment, state interest analysis, that any detriment would be marginal.

c. Conservation was the factor most relied on by both the PSC and the Court of Appeals. We have already pointed out (1) the different conditions which existed in 1973 from those at the time of the instant order and (2) the inability of the PSC to control demand.

The conservation platform of the order reads: "The increased requirement for fuel oil . . . created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply . . . conservation of energy remains our highest priority . . ." (App. 37a).

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5. Amici take no position in opposition to petroleum processors or home heating oil distributors. They have as much right to promote home heating oil as do the electric utilities to promote their product. Their position may prove more or less successful and more or less meritorious. But the relative merits of the two groups of suppliers and the two forms of product only define the issues: (1) who is to make the choice, the state or the consumer; and (2) should the speech of one be silenced by the State but not that of the other.

6. Amici are informed that at least two participants in the 1977 proceedings urged the PSC to conduct evidentiary hearings but that was not done.

Analysis of that platform for First Amendment purposes not only fails to support a finding of a compelling state interest justifying total suppression of promotional advertising, it is fatal to such a finding.

The nation, as well as New York, is confronted with an energy problem. Petroleum is believed to be in long-term short supply and substantially controlled by foreign nations. The supply-demand ratio has allowed world prices to increase, fueling inflation.

Solutions, such as use of coal, coal gasification. solar and nuclear energy have not yet been completely proven or accepted and are matters of primary current public attention and debate.[7] At the same time, the nation's demand for oil-fired energy continues, the lion's share derived from gasoline and petrochemical uses.

This situation may define a national interest in encouraging and promoting petroleum conservation. However, with few exceptions relating to short term gasoline rationing, neither the national nor state governments have sought to impose mandatory reductions in use.

In particular, none has attempted to effect such reductions by means of bans on speech.

It is against this background that the PSC invokes the "nation's" problem to impose "piecemeal-conservation,"

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7. The PSC acknowledged that incremental generation of electricity fired by coal or uranium would affirmatively assist in making this "country" more independent of foreign oil suppliers (and conserve) but threw out this consideration as another side effect on the ground that "most of these major companies" would not use such fuels at this time. (App. 37a).

Mr. Kahn suggested that "apparently" all summer-on-peak companies would use oil "for several years." (App. 49a). But Central Hudson wishes to promote "at present" and for the next "several years" electricity which will require installation of equipment which will last for 20 years. So will that of its competitors, the fuel oil companies.

which it hopes will have "some dampening" effect on "society's total energy requirements . . ." (App. 37a).[8]

The PSC can control only New York State utilities, not sellers of air-conditioning equipment or home heating oil companies, let alone all those in the nation who continue petroleum demand in all its forms. This conservation effort will have *de minimis* impact.[9]

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8. The starting inefficiency of electric as against oil home heating is also at most marginal, as Commissioner Kahn pointed out:

> [T]he three for one comparison grossly exaggerates the relative inefficiency . . . because it fails to take into account the energy costs of delivery of oil to the various points of consumption; the far less than 100% efficiency with which oil is typically burned in furnaces; . . . and the promise of the heat pump sharply increasing the efficiency of the use of electricity for heating. (App. 50a).

Indeed, *Amici* understands the position of Central Hudson to be that when the heat pump is installed it is not at all inefficient as against oil heating but is energy competitive or more efficient.

9. *Amici* are informed that by the most conservative estimates it could fairly bring to bear, including conversion factors favorable to oil heat which it does not accept as fact, Central Hudson has estimated that if every new home built in New York State in 1978 had installed resistance electric space heating, oil consumption in the State would have increased by 9/100 of one percent. Central Hudson does not even wish currently to advertise resistance space heating.

Based on the same conservative assumptions, if all new homes in the state installing heating systems involving the election between heating oil and heat pumps had installed the pumps, Central Hudson estimates that the resulting increased oil consumption from the use of heat pumps for winter heating would have been 9/10,000 of one percent.

Further, if all those new homes had installed heat pumps and they used the pumps for summer air conditioning at average usage rate, the increased oil consumption would be less than 4/100 of one percent. This last figure assumes that all the homeowners involved would not have otherwise installed air conditioning—an assumption grossly contrary to current human experience.

That impact cannot reasonably be regarded as a compelling state interest justifying elimination of First Amendment rights.

4. Misleading signals. The PSC's claim is that Central Hudson is incapable of creating a truthful promotional advertisement which will not give "totally misleading signals that conservation is unnecessary." (App. 57a).[10]

The sample ad of footnote 10 could not reasonably be construed as giving "misleading signals" concerning the necessity of conserving petroleum.

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10. Although advertising amateurs, *amici* have created the following sample ad:

> Energy conservation, particularly petroleum conservation, is one of the most important national and New York concerns. It is essential that every person and company conserve. Existing uses should be cut down and new energy uses must be avoided.
>
> Air-conditioning is a heavy user of electricity which is generated in part from petroleum. If you now have air conditioning you should cut down or eliminate its use. If you do not have air conditioning Central Hudson and the New York Public Service Commission urge you not to install it, either in your present home or in any new one should you be moving or building.
>
> If despite our warnings about the urgent necessity of conserving petroleum you should find it necessary to install air conditioning anyway, then we would suggest you consider installation of an electric heat pump for the winter months. While the air conditioning part of your system will use additional oil-fired electricity, the heat pump feature will probably not add any more to petroleum use than a home heating oil system will and the heat pump will help keep down the costs of electrical service by allowing us to use the idle generating capacity we have in the winter months. The installation of the heat pump will yield a lower overall energy bill than the installation of an oil burner.
>
> Again, we urge our customers not to install air conditioning. If you decide you must, however, please phone your local heat pump dealer or call us.

Moreover, given the stated objective, one must question whether the PSC order will not be counterproductive. It has removed from the market the one regulated advertiser. It has left therein, as it must, the unregulated sellers of air conditioners, home fuel oil, fuel oil furnaces and heat pumps.

C. On the side of free speech lie the interests of the advertiser and its recipient-consumers. Central Hudson wishes to do no more than truthfully promote the use of its existing capacity for its benefit and that of its customers. It has a constitutional right to do so.

The recipient-consumers have an equal right to know the facts so that they can make informed choices. Typically, against the background of his economic resources and his own chosen or circumstance-dictated life style, he has faced and will continue to face and evaluate innumerable economic choices relating to energy and the future.

The utility customer has a right to know the benefits to be derived from using electric heat and heat pumps in the winter as well as to be apprised of its deficiencies. In this particular market, two related facts stand out. First, he will be subject to the sales or advertising efforts of others. Second, if the price of petroleum continues to increase as a result of arbitrary OPEC action or as a result of continuing increased petroleum demand from sources not within the PSC's control, the economic advantages of the heat pump will also increase, at least where the citizen has already decided to install air conditioning.

These latter considerations make it even more inappropriate to suggest that the issue is subject to competition between the state and its citizens for the right to make the choices or that the state is somehow better equipped to make them. That type of state protectiveness of its citizens resting in large measure on advantages of their being kept in ignorance, the Court rejected in *Virginia Pharmacy Board*:

> [I]t is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance.
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> * * *
>
> It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers.
>
> * * *
>
> There is . . . an alternative to his highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours [the PSC's or the Court's] to make or the Virginia [New York] Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. 425 U.S. at 769-770.

In *Bates v. State Bar of Arizona* the court rejected similar protection arguments which it viewed as resting on an underestimation of the public. 350 U.S. at 374-375.

If the public has a right to filter and handle information on some but not all lawyer services, services most citizens infrequently use, surely it has a right to read Central Hudson's promotional messages concerning energy on which it makes almost daily consumption and investment decisions.

Nor can the availability of the constitutional rights of Central Hudson and the public be limited by arguing that the number of citizens' decisions concerning heat pumps will be small. (PSC's Motion to Dismiss Appeal, p. 13.).

First, whatever their number, the decisions will be made as one of a large number of continuing economic decisions reserved to the public, not the state. Second, the argument is an admission, in fact, that the order will have *de minimis* effect.

Moreover, this argument pinpoints the most serious danger inherent in the PSC position, *viz*, the thought with which Americans have become all too familiar, that the invocation of the "vast power of the Public Service Commission" given by the state (the legislature) to itself (the PSC) is self-justified because the power is used against only one company or a narrow group of companies or a small number of citizens; it is only a little abridgement. The abridgement of a constitutional right is never little, and must be clearly, carefully and seriously justified, no less so, but perhaps more so, because it involves our competitive, free enterprise economy.

Finally, the PSC cannot (1) pretend that the order speaks to a monopoly in a noncompetitive market or (2) suggest that equipment dealers provide alternative means for the public to be advised (See, Motion to Dismiss Appeal, p. 15), or (3) suggest that the ban is only a "time, place or manner" regulation (See, Motion to Dismiss Appeal, p. 15).

(1) Monopoly status is granted to electric utilities to eliminate competition in the supply of electricity only. In fact, electricity and heating oil compete. That competition not only cannot be ignored, it is an essential part of this First Amendment case. As Commissioner Kahn observed:

> I also believe in competition as a form of economic organization, wherever it is feasible. And for competition to be effective, some sales promotion is necessary. Even if that were not so as a general matter, it would in my judgment be inescapably so when there compete in the market two rivals, one of whom is free to advertise his wares and other is—under our present policies—not. (App. 49a).

(2) Electric equipment suppliers do not provide alternates to the information carried in Central Hudson's promotional ads. Central Hudson has a right to offer its electricity publically utilizing the known data as it wishes. Manufacturers and dealers may know and use some of the same information, *e.g.*, pump capacities. Central Hudson may have other data known only to it which is essential to its presentation, *e.g.*, that excess capacity continues to exist.

A third category of information exists as to which the utility has better and more information available, *e.g.*, daily oil prices and trends.

Moreover, if conservation be the objective, the suggestion borders on the irresponsible. At a minimum, it ignores the common interests of Central Hudson and those manufacturers and dealers in competition with heating oil distributors and leaves Central Hudson's efforts at odds with the heat pump dealers in the market place (one says conserve, the other doesn't), a result more likely to cause "misleading signals" than the balanced and restrained advertising Central Hudson proposes and to which it has a constitutional right.

(3) The order cannot be remolded into a "time, place or manner" regulation as the PSC may now be suggesting when it asserts that "[h]ome builders (and anyone else) are free to talk to Central Hudson about the costs and benefits of electric heat. . . . Central Hudson . . . remains free to provide advice to customers if they request it." (Motion to Dismiss Appeal, pp. 13, 15).

The suggestion has several legal and practical infirmities (a) Answering questions which may or may not be asked simply is not promotion of sales. The order remains a complete content control;

(b) It ignores the right of the public to receive the proscribed communications;

(c) It invites Central Hudson to do by active indirection what it is prohibited from doing directly; therefore,

(d) As a practical matter the asserted freedom simply does not exist in any meaningful way because a responsible, regulated company will properly be concerned with whether a customer(s), manufacturer(s), dealer(s), or most important the PSC, will think or determine that a conversation or exchange of correspondence, or an aggregation thereof, has amounted to promotional advertising or a course of conduct designed to subvert the order.

The proposed advertisements simply involve truthful advertising promotion of legal products and services and are not in any way parallel to any conduct proscribed by prior decisions.

In sum, the order is constitutionally defective. The PSC has no legitimate, or compelling interest in suppressing all Central Hudson's promotional advertising. There is a recognized national problem affecting every citizen but there is no emergency justifying the imposition of blanket silence on one narrow segment of the population and the suppression of competition. The asserted justifications, cost, environment and energy, are either irrelevant, marginal, or with respect to the energy conservation claim of *de minimis* impact. Evils which might be perceived in the commercial advertising just don't exist and the perception of "misleading signals" is hypothetical and plainly wrong. Even if a trace of validity could be conceived, it would be susceptible of post-publication correction; and most important, there is no justification for usurping from the New York public the energy related economic and social decisions which are theirs to make.

II. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF FIRST AMENDMENT LAW TO THE PSC's ORDER.

The Court of Appeals erred in two major respects:

First, it misconstrued the 1970s cases as applied to *Ohralik* and then misconstrued and misapplied *Ohralik*.

1. Although the Court of Appeals recognized that the PSC's order was a complete content ban on all promotional advertising, it failed to perceive that *Ohralik* involved a "time, place or manner" restriction. As earlier noted, after *Ohralik*, Ohio lawyers are free to engage in advertising. Only face to face solicitation is barred.

2. *Ohralik* did not place primary emphasis on the importance of the free flow of information but on the dangers inherent in face to face lawyer solicitation which, it concluded, was so likely to result in misrepresentation and the exclusion of objective information that it warranted regulation. All of the 1970s cases recognized that "time, place or manner" regulation might be justified in a proper case or that misleading communications could be subject to regulation.

That is not the case here. Central Hudson's promotional advertising contains none of the dangers which the 1970s cases recognized to be subject to regulation and it is certainly opposite to the face to face communication which *Ohralik* banned.

3. *Ohralik* does not suggest that when the free flow of commercial information "is diminished," First Amendment protection reaches "its nadir." *Ohralik* involved serious professional misconduct, comprising a high degree of public danger, as well as inherent misrepresentation. The precise levels of First Amendment protection in commercial speech cases remains to be defined as factual patterns are presented.

Second, the court failed to accord the order the exacting scrutiny required by the First Amendment and erred in the scrutiny in which it did indulge:

> In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping. At best consumers may seek, through the Public Service Commission, to limit future increases in electrical prices. Surely promotional advertising would provide no information of assistance in this respect.
>
> Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and prices" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban. *In the matter of Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 47 N.Y. 2d at 110, 417 N.Y.S. 2d at 39, (App. 13a-14a).

1. The Court of Appeals totally ignored competition between electric utilities and home heating oil dealers. It

failed to perceive and, therefore, evaluate for First Amendment purposes, the market place to which the ads would be directed, and the proper interests of Central Hudson and of citizens in that market place.

2. It concluded somehow that promotional advertising isn't promotional advertising, *i.e.*, concerned with availability, nature and prices of electrical service. The contrary is true. The disputed ads would be premised on the availability of capacity, the nature of the service, *i.e.*, electrical heat as against oil heat, the price, and the downward pressure on rates resulting from use of idle capacity, a beneficial effect as even the PSC admitted.

From the foregoing erroneous premise and its corollary that all promotional advertising seeks to do is to encourage increased electrical usage, apparently for its own sake, the court concluded that the proposed ads would contain no beneficial information, and "may be detrimental to the society." That is not the exacting scrutiny required where a blanket content prohibition is involved.

3. The court then proceeded to assess the constitutional issue as purely a competition between what it erroneously perceived as valueless content (again, without analysis or even consideration of the interests of decision making citizens) and a claimed state interest to which it might apply judicial notice. An interrelated and compounding error was the court's failure to analyze whether imminent danger exists (as it clearly does not) of the types carefully delineated in the 1970s cases and *Ohralik*.

4. Finally, the Court erred in taking judicial notice of the "present energy crisis," without a detailed analysis of its scope and meaning in relation to the resulting ban, and particularly in light of its summary conclusion that "promotional advertising, if permitted, would only serve to exacerbate the crisis." *In the Matter of Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 47 N.Y. 2d at 110, 417 N.Y.S. 2d at 39. (App. 13a-14a).

CONCLUSION

For the reasons stated above, the order of the Public Service Commission denying the right of New York public utilities to engage in promotional advertising should be held unconstitutional and the decision of the New York Court of Appeals reversed.

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CERTIFICATE OF SERVICE

I, Myrna P. Field, one of the attorneys for the *Amici Curiae* herein, hereby certify that on the 14th day of January, 1980, I served three copies of the attached brief on the following:

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